No. 18-726

In the
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF FOR *AMICI CURIAE* WISCONSIN STATE SENATE AND WISCONSIN STATE ASSEMBLY IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST[1]

The Wisconsin Constitution tasks the legislature with drawing state and federal legislative districts after every census. Wis. Const. Art. IV, § 3. Pursuant to that authority, the Wisconsin State Senate and State Assembly enacted Act 43 in 2011. Four years later, a group of Wisconsin Democratic voters sued to invalidate Act 43. The voters alleged that Act 43 unconstitutionally "distributed the predicted Republican vote share with greater efficiency so that it translated into a greater number of seats" for Republicans in the State Assembly. *Whitford v. Gill*, 218 F. Supp. 3d 837, 854 (W.D. Wis 2016). The district court agreed: Act 43 unconstitutionally impeded Democratic voters' "ability to translate their votes into legislative seats, not simply for one election but throughout the life of Act 43." *Id.* at 910.

This Court vacated that decision last term. In *Gill v. Whitford*, the Court ruled that the *Whitford* plaintiffs had no standing to challenge "'their collective representation in the legislature'" or their ability to "influenc[e] the legislature's overall 'composition and policymaking.'" 138 S. Ct. 1916, 1931 (2018). The "fundamental problem with the plaintiffs' case" was that it was one "about group political interests, not individual legal rights." *Id.* at 1933. This Court remanded, giving

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[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

plaintiffs a second chance to prove that each had been individually harmed. *Id.* at 1934.

Now back before the district court, the *Whitford* plaintiffs have attempted to rehabilitate their case by adding new plaintiffs, new constitutional claims, and a new expert. *See Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis.); *see also Wis. Assembly Democratic Campaign Comm. v. Gill*, No. 3:18-cv-00763-jdp (W.D. Wis.).[2] The Wisconsin State Assembly has since intervened, supported by experts of its own. A second trial of plaintiffs' claims has been postponed until this Court decides *Rucho v. Common Cause*, No. 18-422, and *Lamone v. Benisek*, No. 18-726. But both fact and expert discovery continue.

The ongoing discovery in *Whitford* has been illuminating. The parties' battle-of-the-experts has confirmed that partisan gerrymandering claims are nonjusticiable. Indeed, the work of the *Whitford* plaintiffs' new expert (also an expert in *Rucho*) has revealed that the alleged harm in these cases cannot be measured. Nor can plaintiffs' alleged harm be judicially remedied, lest states altogether abandon territorial redistricting.

Both in the *Whitford* litigation and as *amici curiae* here, the legislature has an acute interest in ensuring

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[2] After *Gill*, the Wisconsin Assembly Democratic Campaign Committee filed a second lawsuit against the same election officials. The district court consolidated the *Whitford* plaintiffs' suit with the Committee's, which also alleged that Act 43 violated the Committee's First Amendment associational rights. But in January, the Committee voluntarily dismissed its suit. Order Granting Motion to Dismiss, *Whitford v. Gill*, No. 3:18-cv-00763-jdp (W.D. Wis. Jan. 29, 2019), ECF No. 45.

that the task of redistricting remains with the legislature. The legislature is uniquely positioned to explain that allegedly partisan redistricting is not a problem to be solved by hired experts in federal litigation like *Whitford*.

SUMMARY OF ARGUMENT

This Court remarked in *Gill v. Whitford* that there were "few clear landmarks" in the Court's partisan gerrymandering precedents. 138 S. Ct. 1916, 1926 (2018). That may be so, but the only two landmarks necessary to resolve partisan gerrymandering claims are the following: Plaintiffs are not entitled to proportional representation of Democrats and Republicans in the legislature. Nor can plaintiffs backdoor that relief by claiming they are entitled to politically "competitive" districts, whatever that may mean.

Look no further than the shifting theories of the *Whitford* plaintiffs. Plaintiffs have converted their statewide political gerrymandering claim into district-specific claims alleging that districts are not competitive. But that has not unearthed any justiciable, district-level harm. Plaintiffs have been reduced to declaring districts with greater than 50% Democratic voting strength (measured by an arbitrary selection of elections) as "packed" and districts with less than 50% Democratic voting strength as "cracked."[3] *Voilà!* All

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[3] The *Whitford* plaintiffs have alleged that a plaintiff living in a district with an estimated 50.4% Republican vote share is "cracked." *See, e.g.*, Amended Complaint ¶ 82, *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Sept. 14, 2018), ECF No. 201; *see also id.* at ¶¶ 49, 79 (alleging plaintiffs are "cracked" in districts with estimated 51% Republican vote shares). The *Whitford* plaintiffs also allege that it would be constitutional for a voter to

plaintiffs are harmed, and their chosen remedy is statewide proportional representation. Worse still, the claims are boundless. Every time the Democratic voting strength goes above 50% (packing!), the Republican voting strength is below that threshold (cracking!). The plaintiffs have done little more than dress up their original theory in the gossamer of district-specific claims.

Plaintiffs' quest for partisan proportionality is inconsistent with our system of territorial redistricting. Partisan political affiliation is not uniformly distributed "save in a mythical State with voters of every political identity distributed in an absolutely gray uniformity." *Vieth v. Jubelirer*, 541 U.S. 267, 343 (2004) (Souter, J., dissenting). Like-minded people live with like-minded people. Communities develop shared interests and political preferences. Voters who tend to vote for Democrats tend to live in urban areas, near others who tend to vote for Democrats. Voters who lean Republican tend to disperse throughout a state.

These naturally occurring demographic phenomena affect redistricting. Because the legislature draws contiguous and compact districts, it will not place Madison Democrats in a district with Republicans in the far reaches of Wisconsin's Northwoods. Nor would

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be in a district with an expected 60% Democratic vote share, but the same voter is unconstitutionally "cracked" if the estimated vote share is 60% Republican. *See id.* at ¶¶ 24-26. And they allege that it would be constitutional for one voter to live in a district with an estimated 63% Democratic vote share but unconstitutional for another voter to be "packed" into a district with an estimated 61% Democratic vote share. *Compare id.* at ¶¶ 21-23, *with id.* at ¶¶ 87-89.

such a pairing respect communities of interest, continuity with previous districts, or any number of other traditional redistricting criteria. The application of these criteria often results in a map that is not politically neutral, even before partisan interests enter the calculus. Each of these traditional non-partisan factors may, at any given moment, favor one party or another.

"The reality is that districting inevitably has and is intended to have substantial political consequences." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). When political gerrymandering plaintiffs allege that the political asymmetries in their districts are unconstitutional, what they really mean is that territorial redistricting pursuant to traditional redistricting criteria is unconstitutional. And what they really want is redistricting—even though "root-and-branch a matter of politics," *Vieth*, 541 U.S. at 285 (plurality opinion)—transferred from the political branches to the federal judiciary. Whether there are better means of electing representatives is a debate to be had in the political branches, not the federal courts. The Constitution takes no side in that debate.

When faced with a political gerrymandering claim, a federal court is also without the tools to measure a district's alleged discriminatory effect. Using past election results, hired experts opine on whether there is "too much" partisan advantage. But those expert opinions rest on the flawed assumption that political beliefs are immutable—measurable like race in the racial gerrymandering cases or counted like people in one-person-one-vote cases. Voters' political

beliefs are not so easily coded. For example, in Wisconsin's 2018 general election, a majority of voters in nearly 20% of districts voted both for their Republican State Assembly candidate and the Democratic U.S. Senate candidate.

For all of these reasons, courts cannot measure whether alleged partisan influence has exceeded some hidden constitutional limit. *See League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 419 (2006) (opinion of Kennedy, J.). Even if voters could be reliably counted as Democrats or Republicans, territorial redistricting and traditional redistricting criteria will inevitably (and lawfully) have partisan effects. Even the Platonic district map in which partisan interests played no role will itself have districts where Democrats have been "packed" or "cracked" (at least under the *Whitford* plaintiffs' theory). The resulting statewide map will have a partisan tilt, even if generated by a computer programmed to ignore partisan voting patterns. But there is no reliable way for a federal court to determine that preexisting partisan baseline.

Any attempt to divine a baseline would require a federal court to step into the shoes of legislators. Divining that baseline requires policy judgments about what criteria should take priority in redistricting, and in what relative proportions. When hired experts generate simulated maps as comparators in litigation, those simulations are pre-programmed to prioritize certain redistricting criteria (*e.g.* compactness) and ignore others (*e.g.* continuity with prior district boundaries). These are distinctly political judgments, not judgments for a federal court. *See Holder v. Hall*,

512 U.S. 874, 901 (1994) (Thomas, J., concurring in judgment).

Without a baseline, it is impossible to determine whether the legislature's map exceeded any supposed constitutional ceiling for partisan influence. The only possible answer—that partisan interests can have *no* role in redistricting—is no answer at all. To hold that partisan interests can have no role in redistricting would elevate partisanship to a level of prohibition that even race does not today occupy. *See Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015). Finding that in the Fourteenth Amendment might be difficult.

These problems cannot be avoided by recasting a partisan gerrymandering plaintiff's claim as one about her associational rights. In our two-party system, politics is often a zero-sum game. So a court's attempted vindication of one voter's associational rights could very well harm the associational rights of others. For this reason and others, a majority of this Court has not connected partisan gerrymandering claims to this Court's associational rights cases. Those cases involve harms distinct from those alleged here. Many involve a state's meddling with the machinery of a political party or their candidates. Redistricting legislation imposes no analogous restriction, limitation, or condition on voters' First Amendment activities. Those cases, therefore, do not provide a manageable framework to resolve partisan gerrymandering claims. Plaintiffs' claims are nonjusticiable.

ARGUMENT

I. So Long As Territorial Redistricting Is Constitutional, Political Symmetry Cannot Also Be Constitutionally Required.

The Constitution does not compel proportional representation. Nowhere does the Constitution "sa[y] that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers," either in the state legislatures or in Congress. *Vieth*, 541 U.S. at 288 (plurality opinion); *see also id.* at 308 (Kennedy, J., concurring in judgment) (stating there is "no authority" for the notion that a Democratic majority of voters in Pennsylvania should be able to elect a Democratic majority of Pennsylvania's congressional delegation). By the same token, the Constitution does not require political symmetry in individual districts, meant only to maximize a party's chances of achieving proportional representation statewide. Such political symmetry, both at the state- and district-level, is often unattainable given a state's political geography.

Territorial, winner-take-all districts are rarely politically neutral. That is not the result of legislative ill-will. It is basic demographics: like-minded people live near one another. When legislatures follow traditional redistricting criteria, relatively homogenous communities are grouped together into single contiguous and compact districts.[4] Requiring politically competitive

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[4] *See* Expert Report of James Gimpel, Ph.D. at 6, 34-42, *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Feb. 4, 2019), ECF No. 249 (Gimpel Report).

districts would require a radical departure from traditional redistricting criteria. Only then could a legislature combine disparate populations to manufacture political heterogeneity.[5] Such a departure from traditional redistricting criteria is neither constitutionally required, nor wise.

A. Demographic trends should not be mistaken for "cracking" and "packing."

A state legislature does not start with a blank slate when it sets out to reapportion its citizens. Every state must navigate the web of federal constitutional and statutory requirements. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016) (districts must have near-equal populations); *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (districting cannot dilute the voting strength of minority groups); *Ala. Legis. Black Caucus*, 135 S. Ct. at 1272-73 (districting cannot cause retrogression in minority voting strength in certain jurisdictions); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797, 801 (2017) (racial considerations cannot predominate absent a compelling interest). Beyond those federal requirements, several traditional criteria guide redistricting. Legislators consider whether proposed district lines create compact and contiguous districts, whether they preserve communities of interest, whether they pit incumbents against

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[5] Gimpel Report at 7 ("Elevating the priority of competitiveness in redistricting above traditional redistricting criteria will submerge the many benefits of geographic- and population-based representation determined by winner-take-all elections and the expression of established communities of interest. This will be accomplished by combining disparate populations for the sake of creating an uncharacteristic political heterogeneity.").

one another, or how much they deviate from existing district lines. *See* James A. Gardner, *Representation Without Party: Lessons From State Constitutional Attempts To Control Gerrymandering*, 37 Rutgers L.J. 881, 894-97 (2006); *see, e.g.*, Wis. Const. Art. IV, § 4 (districts "to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable"). These criteria are non-exhaustive; myriad local considerations, such as keeping a public works project in a single district, guide redistricting. *See* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649, 678 & n.95 (2002).

When state legislators apply these traditional criteria, the resulting districts are often not politically competitive. *See Davis v. Bandemer*, 478 U.S. 109, 159 (1986) (O'Connor, J., concurring in judgment). As Justice Breyer noted in his dissenting opinion in *Vieth*, Democrats tend to live closely together in urban areas, while Republicans tend to disperse into suburban and rural areas. 541 U.S. at 359-60; *see* James A. Gardner, *What Is "Fair" Partisan Representation, and How Can It Be Constitutionalized?*, 90 Marq. L. Rev. 555, 565-66, 569 (2007). Drawing contiguous and compact districts means grouping urban Democrats in one district and dispersing rural Republicans among others. Leaving communities of interest intact might mean an intensely progressive college town determines election outcomes in one district, while a farming community does in another.

Discovery in the *Whitford* litigation shows this trend has intensified in recent years: populations are

even more politically homogenous now than they were a decade ago. One of the Assembly's experts has shown that the concentration of historically Democratic voters is increasing in Wisconsin's urban areas.[6] But the number of historically Republican voters is rising throughout the rest of Wisconsin—meaning districts that were previously competitive or leaned Democrat now lean Republican. *See* App. 1a (comparing Figures 3 and 4 in Gimpel Report).[7] In Wisconsin's smallest 62 counties (of 72 total counties), votes cast for Republicans in statewide elections increased by nearly 5% between 2000 and 2016, while votes cast for Democrats decreased nearly 5%.[8]

Together, these trends confirm that Republicans have a natural advantage in a state with Wisconsin's demographics. Even the *Whitford* plaintiffs' experts have confirmed that fact. In the first *Whitford* trial, one expert concluded that Wisconsin's 2002 district map—a *court-drawn* map—significantly benefited Republicans using plaintiffs' preferred measure of

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[6] For example, as the population of Madison's Dane County has grown, so too has the concentration of historically Democratic voters. In 2000, Dane County delivered 11.5% of the Democratic vote for candidate Al Gore. But by 2016, Dane County delivered 15.8% of the Democratic vote for candidate Hillary Clinton. Gimpel Report at 31. Detailed in Part II.A, the political complexion of a state changes over time because voters change over time, as do the parties.

[7] *See* Gimpel Report at 31-34 & Table 1; *see also* App. D to Expert Report of James Gimpel, Ph.D., *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Feb. 4, 2019), ECF No. 249-4 (district-by-district table comparing change in vote share over time).

[8] *See* Gimpel Report, Table 1.

fairness (the efficiency gap).[9] *See Whitford v. Gill*, 218 F. Supp. 3d 837, 938-39 (W.D. Wis. 2016) (Griesbach, J., dissenting) (remarking that the pre-Act 43 court-drawn map showed efficiency gap as high as 11.8%). Now on remand, Dr. Chen has produced more than 9,400 simulated maps (constrained by plaintiffs' cherry-picked redistricting criteria).[10] He has chosen one, Simulated Plan 43995, to compare against Act 43. But Simulated Plan 43995 is a complete outlier, even among Dr. Chen's thousands of simulations. Shown below, its near-zero efficiency gap is multiple standard deviations away from Dr. Chen's median map, which has a 5.7% pro-Republican efficiency gap.[11] Even using plaintiffs' flawed metrics, traditional redistricting criteria benefit Republicans.

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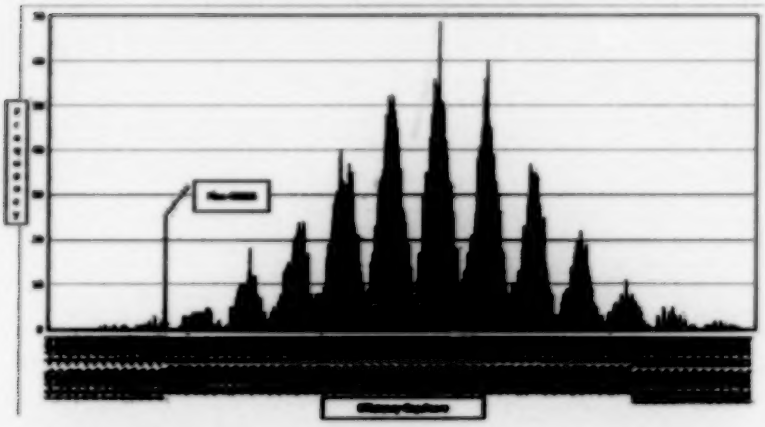
[9] The efficiency gap purports to measure "wasted" votes (meaning votes cast for a losing candidate or excess votes cast for a winning candidate). *See Gill*, 138 S. Ct. at 1933. The efficiency gap equals [(statewide sum of Republican wasted votes)–(statewide sum of Democratic wasted votes)] / (total statewide votes). *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 851-52 (2015). In *Gill*, this Court criticized the efficiency gap as failing to "address the effect that a gerrymander has on the votes of particular citizens." 138 S. Ct. at 1933.

[10] *See* Expert Report of Jowei Chen, Ph.D. at 8-9, *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Oct. 26, 2018), ECF No. 221 (Chen Report). Detailed in Part II.B, these made-for-litigation computer simulations cannot approximate the human judgment exercised in redistricting.

[11] *See* Gimpel Report at 43-45 & Figure 6.

Gimpel Report, Figure 6



These trends directly affect the composition of legislative districts. They make it more likely for Republican candidates to outperform Democrats in winner-take-all elections, even in states that appear to be closely divided based on statewide election returns. Imagine the following hypothetical, 10-district state where the number of historically Republican and Democratic voters are equally divided.[12] Districts 1, 2, and 3 are urban, comprising 7,000 Democrats and 3,000 Republicans. Suburban District 4 is equally matched. And Districts 5 through 10 are rural, comprising 6,000 Republicans and 4,000 Democrats each:

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[12] For simplicity's sake, this hypothetical creates districts of equal size based on *voting-age* population. In practice, states ordinarily comply with the one-person-one-vote rule by creating districts of equal size based on a state's *total* population. *See Evenwel*, 136 S. Ct. at 1124.

DISTRICT	(D) VOTERS	(R) VOTERS
1	7,000	3,000
2	7,000	3,000
3	7,000	3,000
4	5,000	5,000
5	4,000	6,000
6	4,000	6,000
7	4,000	6,000
8	4,000	6,000
9	4,000	6,000
10	4,000	6,000
Statewide Total:	50,000	50,000

Assuming that historically Democratic and Republican voters cast votes for Democratic and Republican candidates respectively, *but see* Part II.A, *infra*, Democrats and Republicans receive the same number of votes statewide. Even so, Republicans will secure at least six seats in the legislature, and Democrats at most four.

The legislature cannot be expected or required to even out the distribution of voters in our hypothetical state so that a political party's representation in the legislature reflects its share of the popular vote. A legislature, for example, will not send a portion of District 1's urban Democrats to District 5, and send District 5's rural Republicans to District 1. If the counties or municipalities in Districts 1 and 5 do not border each other, then moving voters from one district to another would result in "islands" of voters in each

district. Even if the districts' counties and municipalities bordered each other, no constitutional principle requires splitting those communities of interest or making the districts less compact for the sake of political heterogeneity.

Similarly, imagine that more than half of District 3 is a college town that overwhelmingly votes for Democratic candidates. If District 3's college town neighbors District 6, the legislature could move the college town into District 6. But doing so requires the legislature to move other (likely Republican) voters into District 3. District 6 might now lean Democrat and District 3, Republican. But the overall makeup of the legislature is the same. The only way to make both Districts 3 and 6 politically competitive is to sacrifice traditional redistricting criteria—slicing the college town into two, even though it is a community of interest—for the sake of political heterogeneity.

As these examples show, the application of traditional redistricting criteria often results in politically lopsided districts. That should not be mistaken as "cracking" or "packing" like-minded voters. There is a "'natural' packing effect" in states where political groups tend to cluster and where the legislature's objectives are "compactness and respect for the lines of political subdivisions." *Vieth*, 541 U.S. at 289-90 (plurality opinion). Neither the Equal Protection Clause nor the First Amendment requires legislatures to abandon or reprioritize these traditional redistricting criteria to avoid district-level political asymmetries.

Indeed, the homogeneity of territorial districts has democratic benefits. In *Vieth*, Justice Breyer acknowledged that territorial redistricting enables

more citizens to elect legislators with their same views and maintains stability in the legislature. *Id.* at 360 (Breyer, J., dissenting). It also better ensures that both political and ethnic minorities are represented in their state and federal legislatures (as compared to at-large elections or multimember districts). *See Gingles*, 478 U.S. at 47 (recognizing "that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial minorities in the voting population" (cleaned up)); *see also Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 563 (2013) (Ginsburg, J., dissenting) (similar). These benefits are consistent with the long-held notion that legislators represent the distinct interests of a particular place, not merely statewide or nationwide party platforms. *See* Gardner, *What is "Fair,"* 90 Marq. L. Rev. at 575, 577-79.

Compare these democratic benefits to plaintiffs' preferred alternative: politically symmetrical districts. Those districts might maximize competition in district-level elections and increase the odds of statewide proportionality. But maximizing competition "promises to make the greatest number of voters *unhappy* with the outcome of the election....In a highly competitive district, nearly half the voters will have voted for the loser." Persily, *In Defense of Foxes Guarding Henhouses*, 116 Harv. L. Rev. at 668-669 (emphasis added). At the very least, whether the quixotic search for political competitiveness ought to replace traditional redistricting criteria (and the resulting benefits) is a political choice, not a judicial one.

B. Partisan gerrymandering plaintiffs' quest for politically competitive districts is a quest to ban territorial redistricting.

The logical endpoint of plaintiffs' arguments in these political gerrymandering cases is that territorial redistricting is unconstitutional. Plaintiffs bemoan the political asymmetry in their districts. But for the reasons explained above, winner-take-all, territorial districts are often unavoidably politically lopsided. Milwaukee Democrats cannot be included in the same district as Republicans in the Northwoods of Wisconsin. Plaintiffs cannot rid their states of these naturally occurring political asymmetries without also ridding their states of territorial redistricting.

Perhaps at-large or multimember district elections would generate greater competition between the parties for legislative seats in a state like Wisconsin where regions are politically homogenous. *See Baumgart v. Wendelberger*, Nos. 01-c-0121, 02-c-0366, 2002 WL 34127471, at *6 (E.D. Wis. May 30, 2002) (per curiam) ("Wisconsin Democrats tend to be found in high concentrations in certain areas..., and the only way to assure that the number of seats in the Assembly corresponds roughly to the percentage of votes cast would be at-large election of the entire Assembly.").[13] That would be a policy choice for a state and its citizens to

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[13] Depending on voting rules and demographics, at-large or multimember district elections could have the opposite effect—further entrenching a majority party. *See Gingles*, 478 U.S. at 87 (O'Connor, J., concurring in judgment) (using illustration to show that "the at-large or multimember district has an inherent tendency to submerge the votes of the minority").

consider, not something compelled by the Constitution. *See Hall*, 512 U.S. at 901 (Thomas, J., concurring in judgment) (distinguishing "questions of political philosophy" from "questions of law").

Indeed, it would be puzzling for the First or Fourteenth Amendment to prohibit territorial redistricting for state assembly seats when the Constitution's election-specific provisions are silent about the form elections must take. Article IV requires only that states maintain a "Republican Form of Government." U.S. Const. Art. IV, § 4. And the Elections Clause vests state legislatures with the power to dictate the "Times, Places and Manner" of electing U.S. Senators and Representatives but permits Congress to "make or alter" such regulations. U.S. Const. Art. I, § 4. The Framers left unanswered the question whether states should employ single-member districts, multimember districts, or at-large elections. *See Hall*, 512 U.S. at 897-98 (Thomas, J., concurring in judgment).

It would also be puzzling for the Constitution to prohibit territorial redistricting for state legislatures when federal law *requires* single-member district elections for the U.S. House of Representatives. Beginning in 1842 and pursuant to its power under the Elections Clause, Congress prohibited multimember congressional districts, with few exceptions. *See* Apportionment Act of 1842, ch. 47, § 2, 5 Stat. 491; Act of Dec. 14, 1967, Pub. L. No. 90-196, 81 Stat. 581 (codified as amended at 2 U.S.C. § 2c); *cf. Evenwel*, 136 S. Ct. at 1129 ("It cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously

prohibits States from apportioning their own legislative districts on the same basis.").

Any judicial fix for plaintiffs' claims calls into question the constitutionality of a state's choice to adopt single-member, territorial districts. Since the founding, states have debated that choice. *See* Gardner, *Representation Without Party*, 37 Rutgers L.J. at 911-15; *Hall*, 512 U.S. at 897-98 (Thomas, J., concurring in judgment). Wisconsin's very first state Constitution, for example, required "single districts." Wis. Const. of 1848, Art. IV, § 4. Many others elected representatives at large until the mid-nineteenth century. *See* Gardner, *Representation Without Party*, 37 Rutgers L.J. at 913. At bottom, these are political questions. A state's resolution of those questions demands deference. It is part and parcel of the state's "primary responsibility" for reapportionment. *Growe v. Emison*, 507 U.S. 25, 34 (1993).

II. Partisan Gerrymandering Claims Are Nonjusticiable Because Plaintiffs' Alleged Harm Cannot Be Measured.

Federal courts are also without the means to test partisan gerrymandering claims. There is no justiciable way to measure an alleged partisan gerrymander. Whether a redistricting map violates Equal Protection cannot be "judged in terms of simple arithmetic." *Fortson v. Dorsey*, 379 U.S. 433, 440 (1965) (Harlan, J., concurring). Such a "sterile" approach will not tell the federal courts "how much partisan dominance is too much." *Id.*; *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.); *see Hall*, 512 U.S. at 902-03 (Thomas, J., concurring in judgment).

To be sure, this Court has articulated rules in other reapportionment cases. In recent one-person-one-vote cases, state reapportionment plans with a maximum population deviation of less than 10% are presumptively constitutional. *See Harris v. Ariz. Indep. Redistricting Comm.*, 136 S. Ct. 1301, 1307 (2016). The Court has opted for more malleable standards to adjudicate racial gerrymandering claims. *See, e.g., Bethune-Hill*, 137 S. Ct. at 799, 801. But even in racial gerrymandering cases, the minority voters whom the Court intends to protect are readily identifiable.

The same clear rules are unavailable to decide political gerrymandering cases. A voter's political preference is not an immutable characteristic. Voters cannot be categorized as "Republicans" and "Democrats" in the same way voters are categorized in racial gerrymandering cases or populations are counted in one-person-one-vote cases. *See Vieth*, 541 U.S. at 287 (plurality opinion). Further complicating partisan gerrymandering cases is that, unlike race, consideration of partisanship is not *verboten*. *Compare Gaffney*, 412 U.S. at 753 ("Politics and political considerations are inseparable from districting and apportionment"), *with Miller v. Johnson*, 515 U.S. 900, 911-12 (1995) ("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." (quotation marks omitted)).

These features, combined with the reality that districts are politically lopsided to some unknown and

unknowable extent, make a judicial assessment of partisan gerrymandering claims impossible. For courts to decide how much partisan influence is "too much," *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.), courts must divine the starting point—the pre-existing, baseline partisan advantage in a particular state. They will fail.

A. Partisanship is not an immutable characteristic.

Partisan gerrymandering cases rest on the fiction that certain voters vote only for Democrats and others vote only for Republicans in all elections—past, present, and future. Indeed, the methodology of plaintiffs' expert in *Whitford* (who also served as the *Rucho* plaintiffs' expert) depends entirely on the assumption that votes cast between 2004 to 2010 for candidates at the top of the ticket are a reliable measure of the partisan advantage of a particular district.

But measuring partisanship is not so simple. Over time, voters' political preferences change. "[V]oters can—and often do—move from one party to the other...." *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring in judgment). Their political affiliation "is not an immutable characteristic, but may shift from one election to the next." *Vieth*, 541 U.S. at 287 (plurality opinion).[14] "These facts make it impossible to

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[14] *See also* Expert Report of Brian Gaines, Ph.D. at 4-5, *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Feb. 4, 2019), ECF No. 250 (Gaines Report) ("Even if everyone were to lock into a partisan category for a lifetime upon reaching voting age—which is clearly not the case—electorates would still shift in partisanship as their composition changed due to replacement (from

assess the effects of partisan gerrymandering," let alone articulating a standard or crafting a remedy. *Id.*

In *Whitford*, the perceived partisan advantage of Dr. Chen's Simulated Plan changes considerably using more recent election results versus older results. According to Dr. Chen, his Simulated Plan 43995 has a near-zero efficiency gap, plaintiffs' chosen measure of fairness.[15] Election results over time tell a much different story. Using votes cast in 2004 to 2010 statewide elections to measure the efficiency gap, Simulated Plan 43995 shows a pro-Democratic lean (4.81% fewer "wasted" Democratic votes).[16] Gimpel Report, Table 7. Using votes cast in 2012 to 2016

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death, attaining adulthood, and out- and in-migration). Generally, over the lifetime of a redistricting plan, most districts change not only in population levels, but also in their electorates' partisanships.").

[15] *See* Chen Report at 9. In *Whitford*, the "votes" in Dr. Chen's efficiency gap calculation are completely hypothetical. *See id.* at 8. Dr. Chen assumes that if 1,000,000 two-party votes were cast in a particular district with 50.32% Republican advantage (according to his outdated and arbitrary estimation of Republican advantage), then there would be 503,200 Republican "votes" and 496,800 Democratic "votes" in that district's hypothetical election. *See id.* Because Republican votes outnumber Democratic votes, Dr. Chen would classify that district as a Republican victory—meaning there were 3,199 "wasted" Republican votes and 496,800 "wasted" Democratic votes. *See id.* After repeating this methodology for all districts, Dr. Chen summed all wasted votes for each party, then subtracted those sums, and finally divided by the total number of two-party votes cast statewide for his final efficiency gap score. *See id.*

[16] Even though Dr. Chen's efficiency gap scoring also uses 2004-2010 election results, his methodology disguises the 2004-2010 pro-Democratic lean of his Simulated Plan because his measure of partisan advantage (the "Chen Composite Measure") adds a

statewide elections, Simulated Plan 43995's efficiency gap swings the opposite direction: a more significant pro-Republican lean (7.54% fewer "wasted" Republican votes). *Id.* The Plan's Republican advantage is even greater using only votes cast in the most recent presidential election (8.91% fewer "wasted" Republican votes). *Id.* These variations show that political change over time has a dramatic effect, even using plaintiffs' preferred measurement of "fairness."

Recent elections also show that votes cast for particular candidates cannot always predict a voter's party affiliation. Voters do not mindlessly cast votes for all Democrats or all Republicans. Candidates matter.[17] *See Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring); *Vieth*, 541 U.S. at 287 (plurality opinion) ("We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold."). So while a Republican might win a race at the top of the ticket, a Democrat might win the race for State Assembly.[18] *Id.* at 288-89.

1.8% Republican swing to those election results. Only with that swing is Dr. Chen able to say that his Simulated Plan is politically neutral. *See* Chen Report at 3.

[17] *See* Gaines Report at 18-22 (surveying impact of candidate traits including incumbency advantage, race, gender, religion, physical appearance, and leadership quality).

[18] *See* Gaines Report at 18 ("The average Republican (or Democratic) vote for distinct offices need not match, particularly when one compares top-of-the-ballot offices and down-ballot offices. Mixing together multiple contests does not cancel out candidate effects. As a theoretical construct, partisanship is quite distinct from votes cast, and observed vote for a contest or select contests, averaged, is, at best, a noisy measure of the range of partisan

Wisconsin's 2018 elections are telling. Voters in District 92 voted overwhelmingly for U.S. Senate candidate Tammy Baldwin (D) but also overwhelmingly for State Assemblyman Treig Pronschinske (R).[19] The results in District 92 were not a fluke. Also in Wisconsin's Districts 4, 13, 15, 21, 23, 24, 29, 30, 42, 49, 50, 51, 55, 68, 85, 88, and 96, the majority of voters cast ballots for both Democratic Senator Baldwin and their Republican State Assembly candidate.[20] If that is not enough to prove that candidates matter, consider this: In the same election, Senator Baldwin outperformed candidates from her own party like Democratic Wisconsin Governor Tony Evers (by an average of 4.8%).[21] Likewise, 35 Republican Assembly candidates outperformed incumbent Republican Governor Scott Walker (excluding those who ran unopposed).[22]

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attachments—in direction and strength—of those legally entitled to cast those ballots."); *see also id.* at 23 ("Not only are the Chen estimates based on somewhat old results, from 2004-2010, but those election results were surely determined not solely by partisanship of the electorates, but also by candidate traits [such as incumbency advantage], which are ignored in the averaging.").

[19] Senator Baldwin received roughly 53.7% of two-party votes cast; Assemblyman Pronschinske received roughly 55.1% of two-party votes cast. *See* App. G to Expert Report of James Gimpel, Ph.D., *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Feb. 4, 2019), ECF No. 249-7 (Gimpel Report, App. G).

[20] *See* Gimpel Report, App. G. A majority of two-party voters in Wisconsin's District 1 also voted for both Democratic Senator Baldwin and the Republican incumbent for Assembly, who defeated his Independent challenger. No Democratic candidate ran for State Assembly in District 1. *See id.*

[21] *See* Gimpel Report at 59-60; Gimpel Report, App. G.

[22] *See* Gimpel Report, App. G. Wisconsin's 2018 election results are instructive for another reason. Democrats won every

Blind to these political realities, political gerrymandering plaintiffs hire experts who resort to past statewide election results to attempt to predict future district-level elections. At bottom, plaintiffs seek a "constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.). But no amount of vote counting and number crunching by hired experts can overcome the fact that, in the real world, good candidates win and bad candidates lose. Nor can plaintiffs ignore the fact that voters' politics change over time. Political affiliation cannot be labeled or counted in the same way as race in racial gerrymandering cases or people in one-person-one-vote cases. That alone frustrates any attempt by courts to reliably measure partisan unfairness.

B. Courts cannot determine the baseline partisan advantage in a state and therefore cannot decide how much partisan influence is "too much."

All of the above complexities come to a head when a court attempts the impossible: measuring alleged partisan influence to decide whether redistricting crosses the line from permissible partisan advantage

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statewide office. Even if a party is allegedly disadvantaged at the district level, that party is on equal footing at the state level. With sufficient power and coordination, as was the case in Wisconsin in 2018, that party "should be able to elect officials in statewide races—particularly the Governor—who may help to undo the harm that districting has caused the majority's party, in the next round of districting if not sooner." *Vieth*, 541 U.S. at 362 (Breyer, J., dissenting).

to impermissible. This Court's precedents instruct that the permissible amount of partisan influence in redistricting is something more than zero. *See Vieth*, 541 U.S. at 285-86 (plurality opinion) (redistricting informed by partisan considerations is a "lawful and common practice"). But how much more? No one can answer that question because the magnitude of an effect cannot be measured without a control, or baseline.

The Constitution does not wholly forbid the consideration of partisanship in redistricting. Exactly the opposite—by giving legislatures primary responsibility for redistricting, the Framers necessarily anticipated that redistricting would be "root-and-branch a matter of politics." *Id.* at 285. The "opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring in judgment). For this reason alone, the permissible partisan influence cannot be zero.

Even if the Court provided guidance for how much partisanship were too much, it would be impossible to determine when redistricting crossed that threshold. Redistricting, even without any consideration of politics, often does not result in politically neutral districts. Demographic trends will cause a party to pick up legislative seats in excess of their share of the popular vote. Even the thousands of expert-generated simulations in *Whitford* show that the lion's share of Wisconsin maps will advantage Republicans (even maps using plaintiffs' artificial selection and prioritization of redistricting criteria, not the legislature's). *See* pp. 11-12, *supra*. That lopsidedness is an inherent

feature of territorial redistricting with winner-take-all elections. *See Bandemer*, 478 U.S. at 130 (plurality opinion). And it is a lawful feature of territorial redistricting. *See id.*; *Vieth*, 541 U.S. at 289-90 (plurality opinion). The Constitution does not require legislators "to engage in heroic levels of nonpartisan statesmanship," creating a map less favorable to them than thousands of randomly generated maps. *Whitford*, 218 F. Supp. 3d at 938 (Griesbach, J., dissenting).

A federal court must first account for these neutral manifestations of partisan advantage—*i.e.*, the permissible, preexisting partisan baseline—before it can even begin to answer the metaphysical question of how much is "too much." *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.); *see also, e.g.*, *Hall*, 512 U.S. at 887-88 (O'Connor, J., concurring) (concluding there was no "objective alternative benchmark for comparison" in Voting Rights Act case). As discovery in *Whitford* has shown, no amount of expert testimony will help a federal court reliably answer that threshold question.

An expert like Dr. Chen can program a computer to generate thousands of maps, but made-for-litigation maps will not help a court divine the baseline partisan advantage in a state. The algorithms used to generate these maps cannot approximate the boundless redistricting choices available to actual legislators. In *Whitford*, for example, Dr. Chen programmed an algorithm to generate maps with a maximum number of counties or municipalities to split and incumbents to pair, as well as a minimum number of majority-minority districts. Chen Report at 7. Confined by those parameters—and wholly ignoring others including

continuity with prior districts—the maps generated are only the tip of the iceberg. An expert like Dr. Chen cannot possibly account for the near-infinite permutations that are possible when human legislators draw district lines. In real-life redistricting, humans (not computers) must resolve the often-conflicting goals of traditional redistricting criteria and make policy judgments, tradeoffs, and adjustments informed by local knowledge of particular areas. Accepting a baseline based on a sampling of simulated plans takes these policy judgments out of the hands of legislators and puts them into the hands of hired experts. *See Gaffney*, 412 U.S. at 749 (cautioning that federal courts "themselves must make the political decisions necessary to formulate a plan" when they take on reapportionment).

This impossibility cannot be sidestepped by arbitrary benchmarks dreamt up by social scientists or law professors. *See* Gardner, *What Is "Fair,"* 90 Marq. L. Rev. at 566 (describing attempts to construct a "definition of partisan fairness that takes into account both the commitment to partisan proportionality ... and the commitment to territorial election districts" as "generally unsatisfying"); *Hall*, 512 U.S. at 899 n.6 (Thomas, J., concurring in judgment) (criticizing "desire, when confronted with an abstract question of political theory concerning the measure of effective participation in government, to seize upon an objective standard for deciding cases, however much it may oversimplify the issues"). A measure like the efficiency gap is nothing but an *ex post* measure of election outcomes, not an *ex ante* measure of competitiveness. *See*

Gill, 138 S. Ct. at 1933.[23] And it is not a very good measure at that—the efficiency gap is highly variable, punishing states like Wisconsin where elections are won by narrow margins.[24]

Ultimately there is no way for courts to answer how much partisan influence is "too much" unless this Court decrees that *any* partisan consideration in redistricting is "too much." That, of course, is no solution at all. Forbidding partisan considerations in redistricting leads to the ridiculous conclusion that the Constitution offers greater protections to Democrats

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[23] Creators of the efficiency gap have argued that congressional redistricting plans exceeding a 2% efficiency gap and state redistricting plans exceeding an 8% efficiency gap (where sensitivity testing shows the efficiency gap is unlikely to hit 0% over the plan's lifetime) are presumptively invalid. Stephanopoulos & McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. at 886-890. One-size-fits-all benchmarks might work in one-person-one-vote cases. But what might be "fair" in a Democratic stronghold like Vermont might not be in a swing state like Ohio. Likewise what is "fair" in Wisconsin in 2019 might not be "fair" in Wisconsin in 2009. *Compare id.* at 888-89 (proposing static benchmark based on pre-2010 data), *with* pp. 10-11, *supra* (showing regional political homogeneity has increased since 2010).

[24] Take, for example, a four-district state in which each election is won by five votes. If Democrats win two districts and Republicans win two districts, the efficiency gap is 0. But if Democrats win three districts and Republicans win only one district, the efficiency gap is roughly 25%. *See also* Gardner, *What Is "Fair,"* 90 Marq. L. Rev. at 572 ("If every district is split evenly among Republicans and Democrats, then even a slight general shift in voter preferences toward one party can permit that party to win every seat, even if it is supported by only fractionally more than half the electorate. This is not, however, an objection based on a lack of equal opportunity to compete but one based on a lack of equality of outcome.").

or Republicans than racial minorities. Even in racial gerrymandering cases, this Court has acknowledged that race sometimes predominates the redistricting process if there are "good reasons" for doing so. *Ala. Legis. Black Caucus*, 135 S. Ct. at 1274 (quotation marks omitted).

There is no judicially manageable standard for how to measure partisan influence on redistricting. Voters are not easily categorized. People are not born Republicans and Democrats. Over time voting preferences change, the parties change, and the candidates change. Even if Republicans and Democrats were easily categorized, figuring out the baseline map, which will inevitably have some partisan tilt, is impossible. Without a way to identify either voters or the baseline, a court cannot even begin to assess whether partisan gerrymandering has gone too far.

III. Reframing Partisan Gerrymandering Claims As First Amendment Associational Claims Does Not Make Them Justiciable.

There is also no judicially manageable way to balance the First Amendment associational rights affected by any redistricting plan. Every voter in a state has a constitutional right to associate, not just plaintiffs who claim partisan gerrymandering. The moment this Court begins entertaining claims that redistricting burdens one party's right to associate, so too begins the game of judicial whack-a-mole. A judicial remedy for one group of voters could very well frustrate the associational rights of another.

To adjudicate these competing associational claims, courts "will find their decisions turning on imponderables such as whether the legislators of one

party have fairly represented the voters of the other." *Bandemer*, 478 U.S. at 157 (O'Connor, J., concurring in judgment). What causes voters to politically engage? To politically disengage? Why might a voter have a yard sign for one candidate but not another? Donate to one candidate but not another? Attend a town hall meeting one week but not the next? How is a court to know whether changes in a voter's behavior (much less the behavior of many voters) are because of redistricting or because of myriad other factors?

Those "imponderables" are far from the more concrete questions presented in this Court's associational rights cases involving political parties or their candidates. In *California Democratic Party v. Jones*, the state meddled with a party's "internal processes" by requiring the party to open its primary voting to non-party members. 530 U.S. 567, 573, 577 (2000). This Court ruled that California's scheme impermissibly "force[d] political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." *Id.* at 577. Likewise, in *Buckley v. Valeo*, federal law required political committees to divulge their donors before they could accept political contributions. 424 U.S. 1, 64-74 (1976); *see id.* at 84 (holding disclosure requirements constitutional). Similarly, in *Anderson v. Celebrezze*, the state required Independents to file earlier than Democrats or Republicans. 460 U.S. 780, 790-94 (1983). Each of these cases involved a state-imposed requirement or condition affecting the internal operations of political parties or their candidates.

Nothing resembling those state-imposed requirements is present in partisan gerrymandering cases. Redistricting legislation in no way restricts, limits, or conditions a voter's political activity. Plaintiffs instead claim that the majority's redistricting causes a political malaise for the minority, making it more difficult to elect their preferred candidates. That is simply not enough. Even if redistricting makes it more difficult for plaintiffs to elect their preferred candidates, "the power to influence the political process is not limited to winning elections." *Bandemer*, 478 U.S. at 131-32 (plurality opinion). The First Amendment protects the rights of political minorities; it does not shield them from becoming political minorities.

After reapportionment, minority party members might find it more difficult to generate enthusiasm for certain assembly candidates in certain districts; indeed, reapportionment might lead a Democrat to make the "hard choice" of associating with a Republican to find some common ground. *See Cal. Democratic Party*, 530 U.S. at 584. It might cause voters to support candidates likely to lose, or to redivert their energies to other state or national elections. But not every hard choice in politics is tantamount to a "state-imposed restriction" upon voters' freedom to associate. *Id.*

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Nearly fifty years ago, this Court raised concerns that redistricting "is recurringly removed from legislative hands and performed by federal courts." *Gaffney*, 412 U.S. at 749. That concern has only intensified in recent years. And it will reach a fever-pitch if this Court begins policing partisan gerrymandering. Whether a district unfairly disadvantages a political

party is "beyond the ordinary sphere of federal judges." *Hall*, 512 U.S. at 901 (Thomas, J., concurring in judgment). The claim is nonjusticiable.

CONCLUSION

For the foregoing reasons, this Court should rule political gerrymandering claims are nonjusticiable.

Respectfully submitted,

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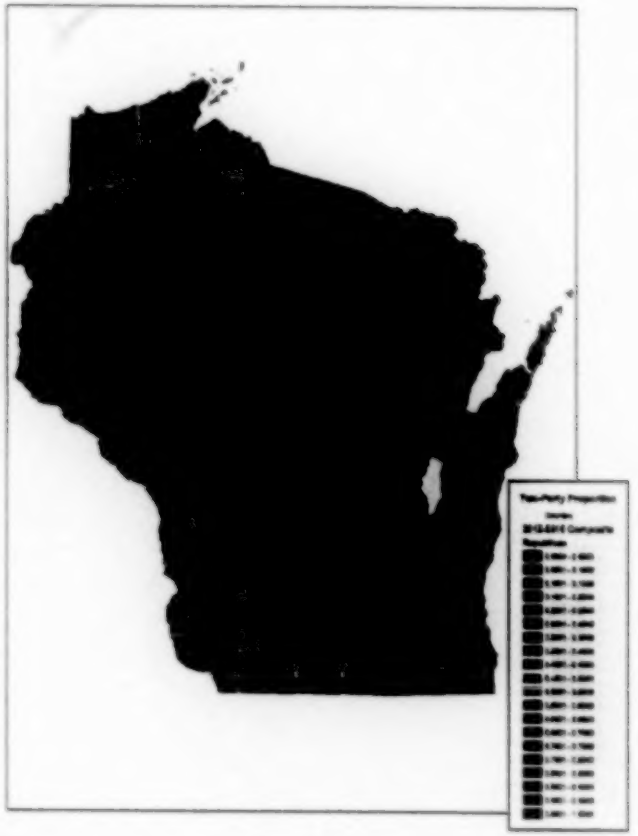
APPENDIX

Gimpel Figure 3
2004-2010 Statewide Elections Two-Party Proportion

Gimpel Figure 4
2012-2016 Statewide Elections Two-Party Proportion



Source: Expert Report of James Gimpel, Ph.D. at 32-33, *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Feb. 4, 2019), ECF No. 249.